

# **Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements**

Draft guidance

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CMA177



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# 1. Overview

- 1.1 Ensuring environmental sustainability is a major public concern. This includes in particular the fundamental challenge of tackling climate change.
- 1.2 The Competition and Markets Authority (CMA) helps people, businesses and the UK economy by promoting competitive markets and tackling unfair behaviour. Within that context, the CMA's ambition includes ensuring that competition supports a resilient economy that can grow sustainably.<sup>1</sup>
- 1.3 One element of this is ensuring that competition law does not impede legitimate collaboration between businesses that is necessary to the promotion or protection of environmental sustainability.
- 1.4 The purpose of this document<sup>2</sup> is to provide guidance on the application of the competition rules to agreements between competitors or potential competitors in relation to environmental sustainability ('**environmental sustainability agreements**').<sup>3</sup> This document also sets out specific additional guidance in relation to agreements which combat or mitigate climate change ('**climate change agreements**') where a more permissive approach is adopted. Further details on the scope of this Guidance and what we mean by '**environmental sustainability agreements**' and '**climate change agreements**' are set out in Section 2 below.
- 1.5 Given the scale of the challenge to address environmental sustainability and particularly climate change, and the degree of public concern about such issues, the CMA is keen to ensure that businesses are not unnecessarily or erroneously deterred from lawfully collaborating in this space due to fears about competition law compliance. This is particularly important for climate change because industry collaboration is likely to be necessary to meet the UK's binding international commitments and legislative obligations to achieve a net zero economy, and to play an essential part in delivering the UK's net zero ambitions.<sup>4</sup>

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<sup>1</sup> The three main pillars of the CMA's work on environmental sustainability are (1) ensuring that markets for sustainable products and services develop in competitive ways; (2) helping consumers make informed choices about the climate impact of the goods and services they use; and (3) ensuring that competition law is not an unnecessary barrier to companies seeking to pursue environmental sustainability initiatives.

<sup>2</sup> The intention is to incorporate this document, once finalised, into the [CMA's Draft Guidance on Horizontal Agreements](#) (CMA174), which was published in draft for consultation on 25 January 2023.

<sup>3</sup> Parties to a vertical agreement on environmental sustainability may want to consider the present guidance, to the extent that it covers issues that are relevant to the particular vertical agreement, in addition to the [CMA Guidance on the Vertical Agreements Block Exemption Order 2022](#) (CMA166). See also footnote 8 below.

<sup>4</sup> The [UK's Net Zero Strategy](#) was published in October 2021 and sets out the UK's ambitions 'to lead the world in ending our contribution to climate change'. [The Climate Change Act 2008 \(2050 Target Amendment\) Order](#)

- 1.6 The CMA has made a public commitment to promoting environmental sustainability and helping to accelerate the transition to a net zero economy<sup>5</sup> and this Guidance forms an important part of the CMA’s wider work in this area.
- 1.7 Effective competition is important, for the benefit of consumers, businesses and, through the spurs to innovation and productivity it engenders, of the economy generally. In these ways competition can help further goals of environmental sustainability; indeed, innovation in sustainability is an increasingly important parameter of competition between businesses, as well as being a policy goal in itself.
- 1.8 Nevertheless, the CMA recognises that there are circumstances where collaboration between competitors may be needed to protect or enhance environmental sustainability. Possible examples include:
- where a firm that acts first by itself to protect environmental sustainability would thereby sustain a competitive disadvantage compared with its rivals, for example where an individual firm might be disadvantaged by switching to a more sustainable but costlier input if its competitors do not do so (a form of ‘first-mover disadvantage’) with the result that no firms have the incentive to switch without some form of collaboration, resulting in a ‘coordination failure’ that collaboration could overcome, or
  - where firms may individually lack the resources and capabilities to achieve more environmentally sustainable outcomes but could achieve them collectively - for example, a firm may have the required technical expertise among its employees to innovate its production processes to reduce its carbon emissions but lacks the R&D facilities to trial and fully develop the innovation.

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[2019, SI 2019/1056](#) amended the existing legally binding target (s1 Climate Change Act 2008) to require the UK to bring all greenhouse gas emissions to net zero (a 100% reduction from 1990 levels) by 2050. In Scotland, the [Climate Change \(Scotland\) Act 2009](#), as amended by the [Climate Change \(Emissions Reductions Targets\) \(Scotland\) Act 2019](#), brings Scotland’s emissions targets to net zero by 2045, with interim targets of 75% below the baseline by 2030, and 90% lower than the baseline by 2040. In Wales, the [Climate Change \(Interim Emissions Targets\) \(Wales\) Regulations 2018](#) sets interim targets of 63% lower than the baseline by 2030, and 89% lower than the baseline by 2040, and the [Environment \(Wales\) Act 2016](#) brings Wales’ emissions targets to net zero by 2050. For Northern Ireland, the [Climate Change Act \(Northern Ireland\) 2022](#) sets the target to lower emissions by at least 100% of the baseline by 2050.

<sup>5</sup> See the CMA’s draft Annual Plan 2023/24, which was published for consultation on 15 December 2022: [Annual Plan consultation 2023 to 2024 \(CMA171con\)](#). Helping accelerate the UK’s transition to a net zero economy and promoting environmental sustainability are included among the CMA’s proposed medium term (3 year) strategic priorities.

1.9 This Guidance explains the circumstances in which collaboration to protect or enhance environmental sustainability may, or may not, be permitted under competition law.<sup>6</sup>

### ***This Guidance***

1.10 The Guidance covers three broad situations within the legal framework for the prohibition on anti-competitive agreements, known as the '**Chapter I prohibition**':

- First, environmental sustainability agreements which are **unlikely to infringe the Chapter I prohibition**. Examples of environmental sustainability agreements which are unlikely to infringe the Chapter I prohibition – either because they do not relate to the way that businesses compete with each other or because they do not have an appreciably adverse effect on competition – are given in **Section 3**.
- Second, environmental sustainability agreements which **could infringe the Chapter I prohibition** (unless they benefit from 'exemption' as described below). Practical examples are set out in **Section 4**.
- Third, environmental sustainability agreements which can benefit from **exemption**. We consider how environmental sustainability agreements which would otherwise infringe the Chapter I prohibition may nonetheless be permitted because of an **exemption** from the prohibition. This is explained in **Section 5** for **environmental sustainability agreements generally**, and in **Section 6**, which explains a more permissive approach for **climate change agreements**.

1.11 **Climate change agreements:** The CMA considers that a more permissive approach to exemption is appropriate in relation to agreements which combat or mitigate climate change. In the specific context of **climate change agreements** (defined in Section 2 of this Guidance), the CMA considers that it is appropriate to apply the criteria for exempting agreements from competition law more broadly than for other types of environmental sustainability agreements or agreements in other areas.<sup>7</sup> This more permissive approach to

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<sup>6</sup> Whether or not a particular agreement or restriction infringes the Chapter I prohibition or benefits from exemption under section 9 of the Competition Act 1998 will depend on the specific facts. Whilst this guidance (and the examples contained in the guidance) are intended to assist businesses, it is for the parties to any agreement to satisfy themselves based on their specific situation that the agreement is compatible with competition law. However, and as mentioned in paragraph 1.13 and set out in more detail in Section 7 of this document, businesses can seek informal guidance from the CMA.

<sup>7</sup> This approach to the application of the exemption criteria also applies to vertical agreements that aim at combating or mitigating climate change or its impact, in line with the UK's binding climate change targets under domestic or international law, and the present Guidance constitutes a subsequent publication for the purpose of footnote 115 of the [CMA Guidance on the Vertical Agreements Block Exemption Order 2022](#) (CMA166).

climate change agreements is justified by the fact that climate change represents a special category of threat: the sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into,<sup>8</sup> set it apart. Additionally, by reducing negative externalities which contribute towards climate change, climate change agreements merit this more permissive approach.

- 1.12 This Guidance therefore sets out the CMA's assessment of the legal analytical framework that applies for environmental sustainability agreements, including climate change agreements.
- 1.13 **Enforcement action:** the CMA will not take enforcement action against environmental sustainability agreements, including climate change agreements, that clearly correspond to examples used in this Guidance and are consistent with the principles set out in this Guidance.
- 1.14 **Ongoing guidance:** We are conscious that this Guidance cannot provide answers to all questions that businesses may have. We are keen to hear from businesses with questions that are not covered by this Guidance, as well as those seeking clarity or comfort on how the Guidance will be applied. In addition, the CMA intends from time to time to publish updated guidance, whether specific to certain types of environmental sustainability agreement or more general, in the light of various sustainability initiatives that are brought to the CMA's attention and the understanding that is thereby built up as this Guidance is applied, to give further and evolving assistance to businesses involved in environmental sustainability. This is explained in more detail in Section 7 below.
- 1.15 **Protection from fines:** Where parties approach the CMA to discuss their agreement and the CMA does not raise any competition concerns (or where any concerns that were raised by the CMA have been addressed), we will not issue fines against the parties that implement the agreement (Section 7 below).

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<sup>8</sup> The UK is a signatory to the Paris Agreement adopted on 12 December 2015, a legally binding international treaty on climate change with a goal to limit global warming to 1.5°C compared to pre-industrial levels. In addition, the Climate Change Act 2008 set a statutory target in the UK to reduce UK greenhouse gas emissions by at least 80% (against 1990 levels) by 2050. In June 2019, that target was extended to 100% (ie reaching 'net zero').

## 2. Scope

### Environmental sustainability agreements

- 2.1 This document applies to **'environmental sustainability agreements'**. This term is intended to capture agreements or concerted practices between competitors and potential competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on environmental sustainability or assessing the impact of their activities on environmental sustainability. At a general level, economic activity may, directly or indirectly, cause negative environmental externalities, including through pollution, reducing biodiversity, or contributing to climate change from greenhouse gas emissions.<sup>9</sup>
- 2.2 Examples of environmental sustainability agreements include agreements aimed at, for example, improving air or water quality, conserving biodiversity or promoting the sustainable use of raw materials.
- 2.3 Agreements which pursue broader societal objectives (for example, improving working conditions) are outside the scope of this document.<sup>10</sup>

### Climate change agreements

- 2.4 **'Climate change agreements'** are a sub-set of environmental sustainability agreements. For the purpose of this Guidance, the term covers agreements which contribute towards the UK's binding climate change targets under domestic or international law.<sup>11</sup> Such agreements will typically reduce the negative externalities from greenhouse gases, such as carbon dioxide and methane, emitted from the production and consumption of goods and services. These negative effects (and so the benefits of reducing them) typically are global in nature and are realised over long time periods (with a high degree of uncertainty about their scale). By reducing the negative externalities, such agreements can generate efficiency gains by enabling a better use of scarce natural resources.
- 2.5 Examples of climate change agreements include, for instance: an agreement between manufacturers to phase out a particular production process which

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<sup>9</sup> Negative externalities occur when production or consumption causes harm to unrelated third parties who are not (sufficiently) compensated for that harm. For instance, the use of vehicles causes harm to society in the form of negative health effects (eg from air and noise pollution). Although users of the vehicles enjoy the benefits, other members of society are not compensated for the harm that they suffer. Were users of vehicles to fully compensate for the harm they cause, this would lead to them incurring higher costs or reducing their usage.

<sup>10</sup> Depending on the nature of such agreements, they may be covered by other parts of the [CMA's Draft Guidance on Horizontal Agreements](#) (CMA174).

<sup>11</sup> See footnote 4.



involves the emission of carbon dioxide; an agreement between delivery companies to switch to using electric vehicles; or an agreement not to provide support such as financing or insurance to fossil fuel producers.

## **Relationship with other parts of the CMA's Guidance on Horizontal Agreements**

- 2.6 This document is intended to supplement and not replace the other parts of the CMA's Guidance on Horizontal Agreements.
- 2.7 Where an environmental sustainability agreement also concerns a type of cooperation described in other parts of the CMA's Guidance on Horizontal Agreements, businesses should also have regard to the relevant part of that guidance in addition to this document. However, where this is the case, and the Guidance on sustainability agreements might be in conflict with other parts of the CMA's Guidance on Horizontal Agreements, the part that applies to the 'centre of gravity' of the cooperation will prevail.<sup>12</sup> For example, an agreement between competitors that is focussed on producing a more environmentally-friendly product, including through joint R&D, should be assessed by reference both to the principles set out in this Guidance on sustainability agreements and to the principles set out in Part 4 of the Guidance on Horizontal Agreements, with the principles in this Guidance on sustainability agreements prevailing.

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<sup>12</sup> See paragraphs 3.2-3.5 of the [CMA's Draft Guidance on Horizontal Agreements](#) (CMA174).

### **3. Environmental sustainability agreements which are unlikely to infringe the prohibition**

- 3.1 This Section covers environmental sustainability agreements which are unlikely to raise any competition concerns and which are therefore likely to fall outside the Chapter I prohibition – either because they do not relate to the way that businesses compete with each other, or because they do not have an appreciably adverse effect on competition.
- 3.2 The boundary between, on the one hand, agreements which do not restrict competition at all and, on the other hand, those which do but are unlikely to have an appreciable effect on competition, is not always clear-cut and will depend on the specific facts. Some of the examples included in this section could fall on either side of the line depending on the precise facts. The outcome for businesses is, however, the same in both cases: their agreement does not breach competition law.

#### **Agreements which do not affect the main parameters of competition**

- 3.3 Businesses can rule out any concerns about competition law compliance if the environmental sustainability agreement in question simply does not affect or engage with the way those businesses compete. This is likely to be the case when the agreement does not affect the main parameters of competition between those businesses, such as price, quantity, quality, choice or innovation. Such agreements will generally fall outside the scope of the Chapter I prohibition. Examples of agreements which are unlikely to affect the main parameters of competition are set out below<sup>13</sup>:
- 3.3.1 An agreement which concerns the internal corporate conduct of businesses,<sup>14</sup> for example, to eliminate the use of single-use plastic in their business premises, or to moderate the use of heating and air-conditioning in offices, or to limit the number of printed materials.
- 3.3.2 An agreement to pool funds to engage in activities to mitigate, adapt or compensate for the effects of greenhouse gas emissions generated in production, where such activities do not affect the main parameters of competition. This could include, for example, where the joint funds are used for training activities for people working in the industry.

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<sup>13</sup> To the extent that businesses might distinguish themselves from competitors on the basis of these factors, any agreement as outlined below is unlikely to constitute an appreciable restriction of competition.

<sup>14</sup> For example, conduct within the same corporate group.

- 3.3.3 An agreement relating to the organisation of a joint campaign to raise awareness about environmental sustainability issues within the industry or among customers.
- 3.3.4 Joint lobbying for policy or legislative changes, such as on carbon pricing, where the arrangement involves no more than undertakings coming together to influence policy or legislative change in order to protect and promote their interests. Such an arrangement must not involve the sharing of competitively sensitive information between competitors, nor must it be an attempt to use lobbying as a means for seeking the exclusion of a competitor (such as for example in the context of a standard-setting process where undertakings seek to exclude competing products by lobbying the standard-setting body in a way that influences the process to the point of controlling it).<sup>15</sup>

### **Agreements to do something jointly which none of the parties could do individually**

- 3.4 Where businesses engage in joint initiatives in circumstances where they would not, in the particular legal and economic context, have been able independently to carry out the initiative on the basis of objective factors, for example because they do not have the technical capabilities, this is unlikely to raise competition concerns (unless the businesses could have carried out the initiative using a form of cooperation that is less restrictive of competition).<sup>16</sup> In such cases, there is no restriction of actual and potential competition that would have existed in the absence of the agreement.
- 3.5 An example is where several housing corporations participate in a pilot project to develop zero-energy housing using a novel, more efficient technology in a particular area. If the housing corporations each individually lack the resources or capabilities such as the technical expertise to undertake this type of project individually, this cooperation is unlikely to raise competition issues.
- 3.6 Another example is where parties cooperate in early-stage scientific or technological research with an environmental sustainability objective. If the parties have complementary skills and would individually, in the absence of the cooperation, not be able independently to engage in this activity and

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<sup>15</sup> See, for example, EU Court of Justice judgment of 12 May 2010, *EMC Development AB v. Commission*, T-432/05, EU:T:2010:189, paragraphs 79-82.

<sup>16</sup> Paragraph 3.39 of the [CMA's Draft Guidance on Horizontal Agreements](#) (CMA174).

therefore would not have been able to develop competing technologies, it is unlikely to raise competition concerns.<sup>17</sup>

### **Cooperation required by law**

- 3.7 Cooperation between competitors which is made or done to comply with a legal requirement is automatically excluded from the application of the Chapter I prohibition.<sup>18</sup> However, the Chapter I prohibition will still apply if the law merely encourages such cooperation, rather than requiring it.
- 3.8 Where businesses agree that they must adhere to existing domestic or international legal requirements, this is also unlikely to raise competition concerns since businesses are expected to operate within the law.

### **Pooling information about suppliers or customers**

- 3.9 An agreement to pool information about the environmental sustainability credentials of suppliers, for example suppliers which have environmentally sustainable value chains, use environmentally sustainable production processes or provide environmentally sustainable inputs, but without requiring the parties to purchase (or refrain from purchasing) from those suppliers and without sharing competitively sensitive information about prices or quantities purchased from those suppliers is unlikely to have an appreciable negative effect on competition.
- 3.10 Similarly, an agreement to pool information about the environmental sustainability credentials of customers, for example customers which recycle and dispose appropriately, but without sharing competitively sensitive information about prices or quantities those customers purchase, is unlikely to have an appreciable negative effect on competition.

### **Creation of industry standards**

- 3.11 Where competitors collaborate to develop industry standards or codes of practice aimed at making products or processes more sustainable, this is unlikely to have an appreciable negative effect on competition, provided that: (i) the participation criteria are transparent; (ii) no firm is obliged to participate in the standard if it does not wish to do so (albeit the standard may oblige those businesses who have committed to participate in the standard to comply

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<sup>17</sup> Parties may also want to consider if their agreement can benefit from the Research and Development Block Exemption Order. See paragraph 4.1 onwards of the [CMA's Draft Guidance on Horizontal Agreements](#) (CMA174).

<sup>18</sup> See paragraph 5 of Schedule 3 to the Competition Act 1998. See also paragraph 3.53 of the [CMA's Draft Guidance on Horizontal Agreements](#) (CMA174).

with the standard and may provide for a mechanism to monitor such compliance); (iii) it is possible for any firm to participate or benefit from the standards/codes of practice on reasonable and non-discriminatory terms; (iv) participating businesses are free to develop alternative standards and to sell products that fall outside of such standards or codes; (v) participating businesses are free to go beyond minimum sustainability targets set by the standard.<sup>19</sup>

- 3.12 An example might be a logo used by publishers to certify that a book or magazine is printed using: (i) a minimum 50% content of recycled paper with all the remaining paper content 100% sustainably sourced (according to objective criteria); and (ii) recognised environmentally friendly printing processes and inks. The rules underpinning the standard are published on a website set up to promote the logo. Participating publishers are not obliged to use the standard on every book that they print, but they are obliged to ensure any book which bears the logo does comply with the standard. Third parties are permitted to use the logo on non-discriminatory terms, provided they too comply with the standard. The publishers are free to consider developing and participating in different standards and are not prevented from using more than 50% recycled material in their books.

### **Phasing out / withdrawal of non-sustainable products or processes**

- 3.13 Where competitors agree to phase out particular non-environmentally sustainable processes or cease supplying certain non-environmentally sustainable products and agree to replace them with more sustainable alternatives, this is unlikely to have an appreciable negative impact on competition where it does not involve an appreciable increase in price for consumers or an appreciable reduction in product choice.
- 3.14 For example, if businesses agree to stop using a particular type of packaging and this does not lead to prices increasing to an appreciable extent, this is unlikely to infringe the Chapter I prohibition. Similarly, if businesses stop supplying a particular type of product, but customers still benefit from significant choice (either from the parties or from other businesses operating in the market), this is unlikely to infringe the Chapter I prohibition.

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<sup>19</sup> Paragraph 5.11 below examines the situation of a standard whereby parties agree not to operate outside it. In that case, the agreement is examined under the section 9 exemption because it is likely to have an appreciable negative effect on competition given the restriction it imposes on parties' ability to operate outside.

## Industry-wide efforts to tackle climate change

- 3.15 The setting of non-binding targets or ambitions for the whole industry with regard to environmental sustainability objectives are unlikely to have an appreciable negative effect on competition. Such an industry wide ambition might concern the reduction of carbon dioxide emissions, but where such targets are not binding on the participating businesses (which remain free to determine their own contribution and the way in which the targets are realised).
- 3.16 Cooperation to better enable firms within an industry to set and achieve their own sustainability targets is also unlikely to have an appreciable negative effect on competition.
- 3.17 For example, the development of a common methodology,<sup>20</sup> which is available on an open-source basis, allowing industry participants to calculate and report the emissions associated with their business activities in absolute terms is unlikely to infringe the Chapter I prohibition.
- 3.18 Similarly, the establishment of a common framework for target setting, including which emissions and business activities are within the scope of the common framework and the duration and timing of the targets, would be unlikely to infringe the Chapter I prohibition. Such a common framework could allow for the unilateral setting, disclosure and reporting of the participants' targets, as well as how – in broad terms – the participants intend to meet their targets and the participants' progress towards meeting those targets.

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<sup>20</sup> Industry participants could decide to develop it directly between themselves or via a third party, for example a trade body.

## 4. Environmental sustainability agreements which could infringe the Chapter I prohibition

- 4.1 This Section considers environmental sustainability agreements which (unlike those in the preceding Section) could infringe the Chapter I prohibition. These will be prohibited, unless they benefit from exemption on the grounds set out in Section 5 (for environmental sustainability agreements generally) and Section 6 (for climate change agreements).
- 4.2 The Chapter I prohibition distinguishes between agreements which infringe the prohibition because they have the ‘object’ of restricting competition (those which can be regarded, by their very nature, as being harmful to the proper functioning of normal competition) and those which infringe the prohibition by virtue of having the ‘effect’ of restricting competition.<sup>21</sup>
- 4.3 This Section starts by giving guidance on when environmental sustainability agreements may have the ‘object’ of restricting competition. It then goes on to set out relevant factors in considering ‘effects’ on competition of types of environmental sustainability agreement.

### Environmental sustainability agreements with the ‘object’ of restricting competition

- 4.4 The distinction between infringement by ‘object’ and infringement by ‘effect’ is important because agreements found to have as their ‘object’ the restriction of competition are assumed by their very nature to be harmful to the proper functioning of normal competition without the need to examine their effects.
- 4.5 Particular caution is therefore needed in relation to environmental sustainability agreements which involve price fixing, market or customer allocation, limitations of output or limitations of quality or innovation, as these typically restrict competition by ‘object’.
- 4.6 For example, an agreement between competitors on the price at which they will sell products meeting an agreed environmental sustainability standard is likely to restrict competition by object. Another example is where an agreement between competitors is aimed at limiting their or others’ ability to

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<sup>21</sup> In order to determine whether an agreement may be considered a restriction of competition by object, it is necessary to have regard to the contents of the agreement, its objectives and the legal and economic context of which it forms part. See the EU Court of Justice judgment of 11 September 2014, *CB v Commission*, C-67/13P, EU:C:2014:2004, paragraph 53.

innovate in order to meet or exceed a sustainability goal or to achieve that goal more quickly are very likely to restrict competition by object.<sup>22</sup>

- 4.7 Where competitors collaborate in order to achieve a sustainability goal, it is possible that some parts of that collaboration may involve a restriction of competition by object even where other aspects of the collaboration may be unlikely to restrict competition.<sup>23</sup>
- 4.8 Although in practice it has sometimes proved difficult to demonstrate that agreements that involve restrictions of competition by object meet the conditions for ‘exemption’ (set out in Section 5 below), nevertheless in certain circumstances such agreements are in principle capable of benefiting from exemption; parties to such agreements, or proposals for such agreements, should not automatically assume that they are prohibited, and should consider whether they might benefit from exemption (by reference to the criteria discussed in Sections 5 and 6 below).
- 4.9 Furthermore, there are circumstances where certain restrictions, which would otherwise be a restriction of competition by object, may be permitted, namely where the restriction is considered to be an ‘ancillary restraint’. This will be the case where the restriction is directly related and necessary to the implementation of a wider environmental sustainability agreement and that wider agreement is itself not in breach of the Chapter I prohibition or benefits from the exemption. In order to be considered an ancillary restraint, it is necessary to examine whether the agreement would be impossible<sup>24</sup> to carry out absent the restriction in question. However, the fact that the operation or the activity covered by the agreement would be more difficult to implement, or

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<sup>22</sup> See, for example, the European Commission’s Decision of 8 July 2021 in the *Car Emissions* case (Case AT.40178), in which the European Commission fined three car manufacturers for their conduct in connection with developing selective catalytic reduction (SCR) systems, which are used to remove NOx from car exhaust flows. It found that the parties colluded to limit technical development in the field of NOx-cleaning and thereby limit customer choice.

<sup>23</sup> See, for example, the European Commission’s Decision of 8 July 2021 in the *Car Emissions* case (Case AT.40178). The European Commission [accompanied its decision with a letter to the parties](#) informing them of the kinds of conduct that it saw ‘no reason to further investigate as [a] competition law infringement’, including: joint development of a software platform for AdBlue dosing; the decision to focus joint development on liquid SCR systems; standardisation of the AdBlue filler neck; joint preparation of charge sheets for parts of SCR systems; discussion of quality standards for AdBlue; discussion of warning strategies aimed at ensuring the timely refill of AdBlue; discussion of the build-up of an appropriate infrastructure for AdBlue supply; and discussion and preparation of a common position of the car manufacturers concerning future legislative proposals concerning car emission cleaning.

<sup>24</sup> EU Court of Justice judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91. See also the judgment of 4 July 2018 of the Court of Appeal (England and Wales) in the joined cases of *Sainsburys v MasterCard*; *AAM v MasterCard*; *Sainsbury’s v Visa* [2018] EWCA 1536 (Civ), paragraphs 58 to 74 (issue not considered on appeal).



less profitable without the restriction concerned, does not in itself make that restriction objectively necessary and thus ancillary.<sup>25</sup>

- 4.10 An example of an ancillary restraint would be in the context of a group of competitors cooperating to jointly purchase inputs with a low carbon footprint from large suppliers. The competitors negotiate for, and buy, those inputs jointly to keep their, and their customers', prices low, thereby encouraging production and purchase of alternative products with a lower carbon footprint. To make it effective, the purchasing group restricts some of its members from holding memberships of, or participating in, other competing purchasing groups. Regardless of whether the restriction on joining other purchasing groups restricts competition by object or effect, it may in this example be treated as ancillary and therefore as not raising competition concerns, provided it is necessary and proportionate to ensuring the purchasing group functions properly and maintains its contractual power in relation to suppliers.<sup>26</sup>
- 4.11 There are also certain types of restriction that in certain contexts would be regarded as a restriction by object but in other contexts would fall to be considered as restrictions by effect. An example of this is an environmental sustainability agreement that involves a group of competing purchasers agreeing only to purchase from suppliers that sell sustainable products. Such an agreement would be unlikely to restrict competition by object despite it involving conduct that could be regarded as a form of collective boycott. This type of agreement can be distinguished from an agreement involving a horizontal collective boycott which has been held in past cases to restrict competition by object. In the case of the horizontal collective boycott, the intention is to eliminate a competitor that is operating at the same level of the market as the participants in the boycott whereas in the case of the purchasing agreement it is to eliminate unsustainable products from the supply chain.<sup>27</sup> Such purchasing agreements should therefore typically be the subject of an effects analysis (see further 4.12-4.14 below), unless the agreement is covered by legal requirements (see paragraphs 3.7-3.8 above).

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<sup>25</sup> See for example the EU Court of Justice judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91. See further paragraph 3.40 of the CMA's Guidance on Horizontal Agreements.

<sup>26</sup> For further guidance on the assessment of purchasing agreements under the Chapter I prohibition, see Part 6 of the [CMA's Draft Guidance on Horizontal Agreements](#) (CMA174), and in particular paragraphs 6.7 to 6.39.

<sup>27</sup> See [Expert report on Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions by Whish and Bailey](#) for the European Commission, 2022.

## Assessing the ‘effects’ of environmental sustainability agreements

- 4.12 Where an environmental sustainability agreement does not qualify as a restriction of competition by object, it will only infringe the Chapter I prohibition if it has an appreciable negative *effect* on competition. Even if it has such an effect, the agreement may still benefit from exemption from the prohibition if it meets the conditions of the exemption (see Sections 5 and Section 6 below).
- 4.13 Environmental sustainability agreements may lead to various types of restrictive effects, such as increased prices, reduced output, product quality, product variety or innovation, market allocation, or anti-competitive foreclosure of other competitors.
- 4.14 In assessing the effects of an environmental sustainability agreement, the factors set out below in particular are likely to be relevant. However, the assessment of the effects of agreements is fact-specific and therefore parties would need to consider the following factors in the context of their agreement.
- The market coverage of the agreement, ie whether the agreement covers all or only part of the relevant market(s). In some cases, the market coverage may be insufficient to distort competition to an appreciable extent, because of the constraint from other products or suppliers.
  - Whether the businesses participating in the agreement, individually or collectively, have market power in the relevant market(s) affected by the agreement. The greater the market power of the businesses participating in the agreement, the more likely it is to have an appreciable impact on competition.
  - The extent to which the agreement constrains the freedom of action of the parties. For example, in the case of an agreement to develop new standards for a particular product, whether the parties remain free to sell products not subject to the standard and whether they are free to take steps which go beyond the minimum set by a standard.
  - The ability for non-parties to participate. For example, in the case of an agreement to introduce a new sustainability labelling system, whether other businesses are able to take advantage of the system on non-discriminatory terms.
  - Whether or not the agreement involves the exchange of competitively sensitive information between the parties that is not necessary for the performance of the agreement.

- Whether the agreement is likely to lead to an appreciable increase in price or reduction in output, product variety, quality or innovation.

## 5. Exemption for environmental sustainability agreements generally

- 5.1 This Section covers agreements which fall within the scope of the Chapter I prohibition and restrict competition appreciably but are capable of **exemption** under section 9(1) of the Competition Act 1998 because the benefits of the agreement outweigh the competitive harm.
- 5.2 Parties seeking to benefit from exemption must be able to demonstrate that their agreement meets each of the following four conditions:
- (1) the agreement must contribute to certain **benefits**, namely improving production or distribution or contribute to promoting technical or economic progress;
  - (2) the agreement and any restrictions of competition within the agreement must be **indispensable** to the achievement of those benefits;
  - (3) **consumers must receive a fair share of the benefits**; and
  - (4) the agreement **must not eliminate competition** in respect of a substantial part of the products concerned.<sup>28</sup>
- 5.3 In this Section, we explain how environmental sustainability agreements can meet each of these conditions.

### Condition 1: Benefits to production, distribution or technical or economic progress

- 5.4 The parties to the agreement need to have evidence of objective benefits arising from the agreement.<sup>29</sup> For example, these benefits can include any of the following:
- eliminating or reducing the harmful effects arising from the production or consumption of particular goods or services that the market has failed to address, for example reducing greenhouse gas emissions;

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<sup>28</sup> See the [CMA's Draft Guidance on Horizontal Agreements](#) (CMA174), paragraph 3.42.

<sup>29</sup> It is sufficient if the arguments and evidence provided by the parties enable the CMA to conclude that the agreement in question is 'sufficiently likely' to give rise to such benefits. See, for example, EU Court of Justice judgment of 6 October 2009, *GlaxoSmithKline*, C 501/06P, C513/06P, C515/06P and C519/06P, EU:C:2009:610, paragraphs 93-95.

- improving product variety or quality (for example, creating new or improved products which have a reduced impact on the environment);
- reducing production and distribution costs (for example, combining resources to create economies of scale in relation to a new, more environmentally sustainable input, enabling the parties to produce or distribute their products more cheaply);
- improving production or distribution processes (for example, the introduction of new cleaner technologies); and
- increasing innovation (for example, developing new, more energy-efficient processes).

5.5 The benefits need to be substantiated and cannot simply be assumed. They also need to be objective, concrete and verifiable. For example, if the parties claim that their production methods will be improved by using cleaner manufacturing processes, they need to be able to describe as concretely as they can the expected benefits (ie what process will be improved and how), how likely it is to materialise and within what timeframe, and to have evidence to support such claims.

5.6 In the context of environmental sustainability, it is not unusual that the benefits may materialise in future, over a relatively long period of time. It is legitimate to have regard to such future benefits.<sup>30</sup> The quantification of such future benefits, and the extent that they may need to be discounted, will need to be considered, according to the nature of the agreement and the claimed benefits (see paragraph 5.25 below).

## **Condition 2: Indispensability**

5.7 The parties to the agreement need to be able to show that the agreement is no more restrictive of competition than is indispensable (or reasonably necessary)<sup>31</sup> to achieving the benefits. In other words, there must be no less restrictive, but equally effective, alternative.<sup>32</sup>

5.8 In practice this means that an agreement or restriction is likely to be considered indispensable, or reasonably necessary, to the relevant benefits if

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<sup>30</sup> See the European Commission's Guidelines on the application of Article 101(3) of the Treaty, OJ C 101/97, 27.4.2004, paragraphs 87-88.

<sup>31</sup> See the European Commission's Guidelines on the application of Article 101(3) of the Treaty, OJ C 101/97, 27.4.2004, paragraphs 73-82.

<sup>32</sup> This is assessed by reference to what the situation would be likely to be with and without the agreement or restriction concerned.

the parties can demonstrate that, in the absence of the agreement, they would not otherwise be able to achieve the level of benefits (of the type described under condition 1 above) which the agreement seeks to achieve (eg for economic reasons or given a lack of expertise or scale), or that the agreement enables the parties to achieve the benefits more efficiently (eg at reduced cost or more quickly). This does not, however, provide a generalised basis to justify moving away from competition on the development of greener technologies, supply chains or products.

- 5.9 For example, an agreement between competitors to adopt a more environmentally sustainable input (eg an alternative to plastic) may be considered indispensable if that agreement enables them to achieve economies of scale by significantly increasing the demand for the more sustainable input (through a lower final sales price), with the result that they benefit from reduced costs compared to the situation where there was not a collective agreement (and subject to meeting all the other exemption conditions too).
- 5.10 Another example would be in an industry in which a less polluting material has been developed, but manufacturers individually are not incentivised to use that new material as it would make their products significantly more expensive and would require them to make additional investments to promote their more sustainable products. In that case, it might be necessary for manufacturers to collectively agree to use the new material to overcome the first mover disadvantage and ensure that the environmental benefits can materialise (or materialise more quickly).
- 5.11 Sometimes the restriction of competition in the agreement may be considered indispensable if it is necessary to align the incentives of the parties and to ensure that they concentrate their efforts on the implementation of the agreement. In that case, the parties would need to prove what additional benefits would result from the restriction that would not have occurred in its absence. For example, where the parties to a standard agree not to operate outside it, they would have to show what benefits would result from the restriction that would not have happened if, for example, they only had established a voluntary standard.
- 5.12 By contrast, where there is demand for a sustainable product, an agreement involving cooperation between various parties will not be indispensable to achieving sustainability benefits on the basis that consumers will in practice buy the product and businesses should compete to satisfy the demand. For this to be the case, there need to be enough consumers willing to pay for the sustainable product. An agreement may however be indispensable if the

demand for the sustainable product leads to insufficient market coverage or limited economies of scale, and collective action by competitors makes it possible for the sustainability benefits that would accrue to the consumers to materialise more quickly or more cost-efficiently or lead to an appreciably larger market coverage.

- 5.13 There may be situations where there are already regulations or policies in place that address the environmental harm which the agreement is seeking to address. A cooperation agreement may, however, be necessary if it enables the parties to exceed the sustainability goal covered by the public policy or regulation or to achieve the goal more quickly or more cost-efficiently. In that case, the parties to the agreement would need to explain what the shortfalls of the existing public policies and regulations are and to what extent the cooperation is indispensable to generate the claimed benefits.
- 5.14 In all cases it is essential that the restrictions in the agreement go no further than is indispensable to the relevant benefits, and careful consideration should be given to the scope and duration of those restrictions. An agreement must not contain any unnecessary restrictions of competition. If the overall objective can be realised in a less restrictive manner, without this taking away from the magnitude or timescale of the potential benefits and the likelihood that they will be achieved, then that approach should be taken. For example, where an agreement involves businesses jointly producing a new, more sustainable product, it is unlikely to be necessary for the parties to agree the price at which they will sell the new product for the benefits of the collaboration to be realised.

### **Condition 3: Consumers receive a fair share of the benefit**

- 5.15 The parties need to be able to show that the benefits that result from the agreement are passed on to UK consumers and that those benefits outweigh the harm that UK consumers will suffer as a result of the agreement.
- 5.16 For these purposes, benefits can include future as well as current benefits (see paragraph 5.6 above on quantification of future benefits), that accrue to direct as well as indirect users (in other words, they include not just the direct customers of the parties to the agreement, but also those who purchase from those customers).
- 5.17 Consumers may benefit directly as a result of their consumption or use of the products covered by the agreement. This would be the case, for example, where the agreement results in improved product quality or variety or lower prices. For example, an agreement to replace plastic packaging with

packaging made from other more environmentally sustainable material could benefit consumers directly by increasing the longevity of the products in question or because it reduces the price of the product.

- 5.18 Consumers may also benefit indirectly, for instance where they value the broader environmental sustainability benefits of the agreement and the impact of those benefits on others (outside the relevant market). An example would be where furniture producers cooperate not to import or produce furniture made from wood grown unsustainably and this leads to significantly higher furniture prices. Consumers may be willing to pay higher prices for furniture made from sustainable wood because they value the (indirect) benefit of not contributing to deforestation, and not (or not exclusively) because of any direct use benefit, such as any improvement in furniture quality or longevity. In this example, for the purported benefits to be taken into account, the parties would be expected to provide evidence to demonstrate that consumers value those benefits, for example consumer survey evidence.

### ***Who are the relevant consumers?***

- 5.19 In general, in assessing whether consumers receive a fair share of the benefits of the agreement, the relevant consumers are consumers of the products or services to which the agreement relates (ie consumers in the relevant market). The cost to those consumers of the restrictive effect must therefore be offset by the benefits those consumers receive. For example, where the agreement limits the use of environmentally harmful components in a certain product and that results in a higher price for consumers, the benefit those consumers receive from the improved environmental quality of the product must outweigh the increased cost. In contrast, it is not normally appropriate to offset the harm to consumers in one market against benefits arising to a different set of consumers in another market.<sup>33</sup>
- 5.20 However, where two markets are related, benefits achieved on separate markets can be taken into account, provided that the consumers affected by the restriction and receiving the benefit are substantially the same or substantially overlap. An example would be where two airlines cooperate to achieve a particular sustainability benefit on a certain airline route and this leads to higher prices for UK airline passengers. In this example, for those consumers who travel both on the airline route on which the cooperation takes place and on connecting routes, it would potentially be appropriate to take into account benefits to those consumers that accrue on both sets of routes on the

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<sup>33</sup> See judgment of the UK Supreme Court of 17 June 2020 in *Sainsbury's v Mastercard* [2020] UKSC 24, paragraph 174.



basis that there is a substantial overlap in the consumers flying on those routes.<sup>34</sup>

- 5.21 In the case of agreements to achieve environmental sustainability benefits, the overall benefits of these agreements may extend beyond the consumers of the specific products in question. As noted above, in general, it will only be appropriate to take account of the proportion of those wider environmental benefits that are enjoyed by the consumers of the product in question. For example, there may be a societal benefit (arising now or in the future) to restricting plastic use, but only the proportion of this wider societal benefit that can be apportioned to consumers of the product in question (and, where appropriate, in related markets) is relevant for the assessment. It is for the parties to decide which type of benefits (direct, indirect or collective benefits) they want to bring forward and depending on the case, they may be able to take into account a combination of various types of benefits.
- 5.22 For climate change agreements, a more permissive approach to assessing consumer benefits, and in particular who are the relevant consumers, is appropriate. This is explained further in Section 6 of this document.

***The benefits must be substantial and demonstrable***

- 5.23 To satisfy condition 3 (see paragraph 5.15 above), the parties need to be able to demonstrate that the benefits are substantial enough to offset any harm caused (ie the restriction of competition).
- In many cases, it will not be necessary to quantify the benefits precisely. In particular, this will be the case if it is clear that the benefits are of a sufficient scale to offset (or more than offset) the harm to competition, for example, because the agreement will only result in a limited price increase or reduction in choice, and it is obvious that the benefits will be significant.
  - In other cases, some quantification of the benefits may be necessary.
- 5.24 Businesses are expected to appraise both the environmental benefits (and negative effects, if applicable) and the effects on competition from an agreement. When it is unclear that the total benefits are sufficient to outweigh the total harm, the parties to the agreement will need to quantify the benefits and negative effects.<sup>35</sup> However, we recognise that the quantification exercise

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<sup>34</sup> See European Commission Decision of 23 May 2013 in Case AT.39595, *Air Canada/United Airlines/Lufthansa*.

<sup>35</sup> In order to balance the benefits against the harm, it may also be necessary to quantify the harm caused by the agreement (eg the extent of any likely price rise).

may not always be straightforward and that it may not always be possible to come up with a precise answer.<sup>36</sup>

5.25 For many of the challenges of quantifying environmental and competitive benefits and negative effects, there are established techniques that can be employed to overcome these. First, there are methodologies for the quantification of many types of environmental benefits.<sup>37</sup> These include techniques to express non-monetary benefits in monetary values. For instance, in relation to greenhouse gas emission reductions, there are established instruments for carbon pricing such as the UK Emissions Trading Scheme, which may be applied to convert the reduction in greenhouse gas emissions into monetary values.<sup>38</sup> Second, there are also established techniques for comparing costs and benefits which occur over different time periods on a consistent basis (eg, by applying an appropriate discount rate)<sup>39</sup> and for dealing with uncertainty in appraising these costs and benefits (eg, sensitivity and scenario analyses).<sup>40</sup> Businesses should apply these techniques in a way commensurate with the size of the agreement's effects. We would expect businesses to follow best practice appropriate for the industry in which they operate and the nature of environmental benefits at hand.<sup>41</sup> Parties may want to approach the CMA to discuss their approach under the CMA's open-door policy (See Section 7 below).

#### **Condition 4: No elimination of competition**

5.26 In order to benefit from the exemption, the agreement must not eliminate competition in respect of a substantial part of the products in question. In other words, there must be some remaining competition on the market(s) affected by the agreement.

5.27 Where the agreement covers the entire market, this condition may still be satisfied if there is still scope for the parties to compete on key parameters (eg on price or quality), even if they align other aspects of their competitive behaviour. In situations where the agreement only covers some, but not all, businesses within the market, the condition would be satisfied.

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<sup>36</sup> See paragraph 94, 102, and 103 of the European Commission's Guidelines on the application of Article 81(3).

<sup>37</sup> Methodologies for quantifying environmental benefits are discussed in a report commissioned by the Dutch and Greek competition authorities. See [Technical Report on sustainability and \(acm.nl\)](#). See also section 9 of the [Green Book, which is guidance published by HM Treasury on appraising public policy options](#).

<sup>38</sup> There are also approaches to quantifying costs. See for instance for the food sector: de Adelhart Toorop et al. (2021) 'Methodologies for true cost accounting in the food sector' in *Nat Food* 2, 655–663.

<sup>39</sup> For a methodology, see for instance: [Freeman et al. \(2018\) 'Social Discount Rates for Cost-Benefit Analysis: A Report for HM Treasury'](#).

<sup>40</sup> See the Stern Review: the Economics of Climate Change (2006).

<sup>41</sup> Traditional approaches to discounting may not always be appropriate, in particular taking into account the risk of underestimating future environmental benefits (see also paragraph 6.4 below).

## 6. Exemption for climate change agreements

- 6.1 The criteria for exemption applicable to climate change agreements (as defined in paragraph 2.4 above) are the same as the four conditions described in Section 5 above – save that, in considering condition 3, the need for consumers to have a fair share of the agreement’s benefits, the CMA considers that a more permissive approach is appropriate in assessing who are the relevant consumers.
- 6.2 As explained in Section 5, the ‘fair share to consumers’ condition generally requires an assessment of whether the harm to consumers of the agreement’s products is offset by benefits to substantially the same set of consumers. With limited exceptions,<sup>42</sup> benefits to consumers in other markets are not included in this assessment.<sup>43</sup> What this means is that where the benefits arise across multiple markets, only the proportion of the benefits which accrues to the consumers harmed by the agreement is taken into account (see paragraph 5.19 above).
- 6.3 In the context of climate change agreements, there is a concern that having regard only to benefits accruing to the consumers in the relevant market would have perverse and harmful effects. If, for example, an individual business is minded to switch to energy use that will reduce carbon emissions, such as abandoning fossil fuels, which will be more costly in the short term (giving an immediate competitive disadvantage), it might be reluctant to do so unless its competitors in the same market do so too. Its fear of the ‘first mover disadvantage’ might therefore constrain it from switching to energy sources that would combat or mitigate climate change. It is only if that business can coordinate such a switch of energy use with its competitors, that this constraining factor is removed and the business is willing to make the (beneficial) switch. Such coordination between competitors is to be encouraged.
- 6.4 The CMA therefore considers it appropriate, in the case of climate change agreements, to depart from the general approach and exempt such agreements if the ‘fair share to consumers’ condition can be satisfied taking into account the totality of the benefits to all UK consumers arising from the agreement, rather than apportioning those benefits between consumers within the market affected by the agreement and those in other markets. The CMA considers that the full benefits to all UK consumers should be, exceptionally,

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<sup>42</sup> See above, paragraphs 5.19 to 5.21, and also paragraph 43 of the European Commission’s Guidelines on the application of Article 81(3).

<sup>43</sup> This traditional approach reflects concerns to avoid the risk of opening the door to trading off other public policy goals against competition and leaving groups of consumers worse off in pursuit of those broader goals.

taken into account because of the exceptional nature of the harms posed by climate change (and therefore the exceptional nature of the benefits to consumers from combating or mitigating climate change or its impact); climate change represents a special category of threat that sets it apart and requires a different approach to the pass-on criteria. This reflects the sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into. It also reflects the fact that climate change agreements seek to limit negative externalities of a type that are likely to have devastating effects inside the UK and outside of the UK and immeasurable long-term effects on the whole planet once certain tipping points are reached.

- 6.5 For example, an agreement between delivery companies to switch to electric vehicles would benefit all UK consumers through a reduction in carbon dioxide emissions. As this is a climate change agreement, the different approach to the 'fair share to consumers' condition means that the delivery companies will be able to take into account the totality of the carbon dioxide emissions reduction to compensate the harm to competition that results from their agreement, without apportioning those benefits between consumers of the delivery service (inside the relevant market) and all UK consumers (ie the wider group of the consumers who benefit from the agreement, which is outside the relevant market).
- 6.6 To benefit from this approach, the parties to the agreement would need to demonstrate that the benefits are in line with existing legally-binding requirements or well-established national or international targets, that UK consumers benefit from the agreement and that the benefits offset the harm. In taking account these benefits, both the direct and indirect benefits to the consumers in the relevant market and the benefits to UK consumers in general are potentially relevant. Such an assessment will therefore require an appraisal of both environmental benefits and negative effects. Businesses should carefully describe the environmental benefits (and environmental harm, if applicable) and any effect on competition. As set out in paragraphs 5.23 to 5.25 above, we would expect businesses to apply the same considerations as to whether there is a need to quantify and, in cases where there is a need to quantify, for them to apply appropriate quantification techniques in a way commensurate with the relative size of the agreement's effects and to follow best practice recognised in the industry in which they operate and appropriate for the nature of environmental benefits and effects on competition at hand. As for any other agreement that restricts competition appreciably, the parties to a climate change agreement will also have to demonstrate that the other conditions of exemption are met.

6.7 The CMA considers that this approach to the 'fair share to consumers' condition is in line with existing case law on the application of the exemption,<sup>44</sup> but, in any event, the CMA will not prioritise enforcement action against parties to climate change agreements that meet the requirements set out in this Guidance (including in Section 6, see also paragraph 7.10 and 7.11 below).

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<sup>44</sup> In *Sainsbury's v Mastercard* [2020] UKSC 24, the UK Supreme Court confirmed the principle that the harm to one set of consumers should not be offset against the benefits to a different set of consumers (see, in particular, paragraphs 173 and 174). However, this was in a situation where the customers sustaining harm from the agreement were different from the customers benefiting from the agreement (retailers vs cardholders) – the two sets of customers were essentially separate from each other. In contrast, the benefits of mitigating the impact of climate change apply to society as a whole, a group of consumers which by definition includes, and is not wholly distinct from, the consumers of the agreement products who may be adversely affected by the restrictive effects of the agreement.

## 7. CMA's open-door policy, enforcement action and protection from fines

- 7.1 We appreciate that this Guidance cannot answer all of the questions that stakeholders may have about whether their environmental sustainability initiatives are compatible with UK competition law. However, the CMA is determined to help businesses who genuinely try to do the right thing in relation to environmental sustainability.
- 7.2 Therefore, the CMA is operating an open-door policy whereby businesses considering entering into an environmental sustainability agreement can approach the CMA for informal guidance on their proposed initiative. This could be because businesses have questions or concerns that are not covered by this Guidance or in order to seek clarity or comfort on how the Guidance will be applied in the particular circumstances.

### Practical steps when approaching the CMA for informal guidance

#### *When to contact the CMA*

- 7.3 We would typically expect businesses to approach the CMA at an early stage in the development of an environmental sustainability initiative, having first conducted an initial self-assessment of their agreement following the principles set out in this Guidance. The parties should highlight the specific issues which are not clear from this Guidance and where they need advice from the CMA.
- 7.4 Parties should contact [sustainabilitytaskforce@cma.gov.uk](mailto:sustainabilitytaskforce@cma.gov.uk) with their request for informal advice, providing any documentation relevant for the assessment of the agreement in good time before any initial meetings.

#### *Informal assessment by the CMA*

- 7.5 Informal assessment will be conducted on the basis of publicly available information and the information shared with us by the undertakings.
- 7.6 The CMA will indicate any options, concerns, risks and possible solutions available to parties in relation to the proposed agreement.

7.7 Where we feel comfortable, we may provide comfort to businesses that we do not think that competition law is engaged or we think that the conditions for exemption are met and, based on the information we have seen, how we believe our Guidance applies. In some circumstances, we may agree adjustments with the parties that should be made to the agreement before it is implemented.

### ***Implementation***

7.8 Following engagement with the CMA, we would expect parties to implement the adjustments necessary to bring their agreement in line with competition law before putting their agreement into practice.

### ***Monitoring and further adjustments***

7.9 Where a party comes to us in good faith for informal guidance, and it later transpires that their agreement appreciably restricts competition, we would expect to consult with the parties to agree adjustments to bring the agreement to the right side of competition law.

### ***Enforcement***

7.10 The CMA will not take enforcement action against environmental sustainability agreements, including climate change agreements, that clearly correspond to examples used in this Guidance and are consistent with the principles set out in this Guidance.

7.11 Where parties are unsure about the applicability of this Guidance to the initiatives that they wish to engage in, they should consider contacting the CMA (see paragraphs 7.3 and 7.4 above).

### ***Protection from fines***

7.12 We will not issue fines against parties that implement an agreement which was discussed with the CMA in advance and where the CMA did not raise any competition concerns (or where any concerns that were raised by the CMA have been addressed). However, this is on the condition that the parties did not withhold relevant information from the CMA which would have made a material difference to its assessment. We would also expect parties to make any adjustments required to bring the agreement in line with the competition rules.

## ***Publication***

- 7.13 The CMA would typically expect, giving due regard to any confidentiality concerns (and after consultation with the parties), to publish a summary of initiatives with an assessment of risks and solutions. These examples will support similar initiatives to proceed with confidence of how to remain on the right side of competition law.
- 7.14 As we learn more about the issues faced by businesses in navigating the application of the Chapter I prohibition in relation to environmental sustainability initiatives, we may update this Guidance or publish supplementary guidance in order to provide greater clarity to business.